§ 517. Depositions taken upon interrogatories, *under a special commission*, cannot be read without proof of the commission, under which they were taken; together with the interrogatories, if they can be found. The absence of the interrogatories, if it renders the answers obscure, may destroy their effect, but does not prevent their being read.[1] Both depositions and affidavits, taken in another domestic tribunal, may be proved by examined copies.[2]

§ 518. *Testaments*, in England, are proved in the Ecclesiastical Courts; and in the United States, in those Courts which have been specially charged with the exercise of this branch of that jurisdiction; generally styled Courts of Probate, but in some States known by other designations, as Orphans' Courts, &c. There are two modes of proof, namely, the common form, which is upon the oath of the executor alone, before the Court having jurisdiction of the probate of wills, without citing the parties interested; and the more solemn form of law, *per testes*, upon due notice and hearing of all parties concerned.[3] The former mode has, in the United States, fallen into general disuse. By the Common Law, the Ecclesiastical Courts have no jurisdiction of matters concerning the realty; and therefore the probate, as far as the realty is concerned, gives no validity to the will.[4] But in most of the United States, the probate of the will has the same effect, in the case of real estate, as in that of the personalty; and where it has not, the effect will be stated hereafter.[5] This being the case, the present general course is to deposit the original will in the registry of the Court of Probate, delivering to the executor a copy of the will, and an exemplification of the decree of allowance and probate. And in all cases, where the Court of Probate has jurisdiction, its decree is the proper evidence of the

[1] Rowe *v.* Brenton, 8 B. & C. 737, 765.

[2] 2 Phil. Evid. 151, 152, and authorities there cited.

[3] 2 Bl. Comm. 508.

[4] Hoe *v.* Melthorpe, 3 Salk. 154; Bull. N. P. 245, 246.

[5] See Post, § 550, and Vol. 2, tit. Wills, § 672.

probate of the will, and is proved in the same manner as the decrees and judgments of other Courts.[1] A Court of Common Law will not take notice of a will, as a title to personal property, until it has been thus proved;[2] and where the will is required to be originally proved to the Jury, as documentary evidence of title, it is not permitted to be read, unless it bears the seal of the Ecclesiastical Court, or some other mark of authentication.[3]

§ 519. *Letters of administration* are granted under the seal of the Court, having jurisdiction of the probate of wills; and the general course, in the United States, as in the case of wills, is to pass a formal decree to that effect, which is entered in the book of records of the Court. The letter of administration, therefore, is of the nature of an exemplification of this record, and as such is received without other proof. But where no formal record is drawn up, the book of Acts, or the original minutes or memorial of the appointment, or a copy thereof duly authenticated, will be received as competent evidence.[4]

§ 520. *Examinations* of prisoners, *in criminal cases*, are

[1] Ante, § 501 – 509, 513; Chase *v.* Hathaway, 14 Mass. 222, 227; Judge of Probate *v.* Briggs, 3 N. Hamp. 309; Farnsworth *v.* Briggs, 6 N. Hamp. 561; Cowen & Hill's notes 767, 768, to 1 Phil. Evid. 397.

[2] Stone *v.* Forsyth, 2 Doug. 707. The character of executor may be proved by the Act-book, without producing the probate of the will. Cox *v.* Allingham, Jacob, R. 514. And see Doe *v.* Mew, 7 Ad. & El. 240.

[3] Rex *v.* Barnes, 1 Stark. R. 243; Shumway *v.* Holbrook, 1 Pick. 114. See further, 2 Phil. Evid. 172; Gorton *v.* Dyson, 1 B. & B. 221, per Richardson, J.

[4] The practice on this subject is various in the different States. See Dickenson *v.* McCraw, 4 Rand. 158; Seymour *v.* Beach, 4 Verm. 493; Jackson *v.* Robinson, 4 Wend. 436; Farnsworth *v.* Briggs, 6 N. Hamp. 561; Hoskins *v.* Miller, 2 Devereux, 360; Owings *v.* Beall, 1 Littel, 257, 259; Browning *v.* Huff, 2 Bailey, 174, 179; Owings *v.* Hull, 9 Peters, 608, 626. See also, Bull. N. P. 246; Elden *v.* Keddel, 8 East, 187; 2 M. & S. 567, per Bayley, J.; 2 Phil. Evid. 172, 173; 1 Stark. Evid. 255.

usually proved by the magistrate or clerk who wrote them down.[1] But there must be antecedent proof of the identity of the prisoner and of the examination. If the prisoner has subscribed the examination with his name, proof of his handwriting is sufficient evidence that he has read it; but if he has merely made his mark, or has not signed it at all, the magistrate or clerk must identify the prisoner, and prove that the writing was duly read to him, and that he assented to it.[2]

§ 521. In regard to the *proof of writs*, the question whether this is to be made by production of the writ itself, or by a copy, depends on its having been returned or not. If it is only matter of inducement to the action, and has not been returned, it may be proved by producing it. But after the writ is returned, it has become matter of record, and is to be proved by a copy from the record, this being the best evidence.[3] If it cannot be found, after diligent search, it may be proved by secondary evidence, as in other cases.[4] The fact, however, of the issuing of the writ may sometimes be proved by the admission of the party against whom it is to be proved.[5] And the precise time of suing it out may be shown by parol.[6]

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[1] 2 Hale, P. C. 52, 284.

[2] See Ante, § 224, 225, 227, 228.

[3] Bull. N. P. 234; Foster *v.* Trull, 12 Johns. 456; Pigot *v.* Davis, 3 Hawks, 25; Frost *v.* Shapleigh, 7 Greenl. 236; Brush *v.* Taggart, 7 Johns. 19; Jenner *v.* Jolliffe, 6 Johns. 9.

[4] Ante, § 84, note (2).

[5] As, in an action by the officer against the bailee of the goods attached, for which he has given a forthcoming obligation, reciting the attachment. Lyman *v.* Lyman, 11 Mass. 317; Spencer *v.* Williams, 2 Verm. 209; Lowry *v.* Cady, 4 Verm. 504; Foster *v.* Trull, 12 Johns. 456. So where the sheriff is sued for an escape, and has not returned the precept, on which the arrest was made. Hinman *v.* Brees, 13 Johns. 529.

[6] Lester *v.* Jenkins, 8 B. & C. 339; Morris *v.* Pugh, 3 Burr. 1241; Wilton *v.* Girdlestone, 5 B. & Ald. 847; Michaels *v.* Shaw, 12 Wend. 587; Allen *v.* The Portland Stage Co. 8 Greenl. 207; Taylor *v.* Dundass, 1 Wash. 94.

§ 522. We proceed, in the next place, to consider THE ADMISSIBILITY AND EFFECT OF RECORDS, as instruments of evidence. The rules of law upon this subject are founded upon these evident principles, or axioms, that it is for the interest of the community that a limit should be prescribed to litigation; and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever. It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be held bound.

§ 523. Under the term *parties*, in this connexion, the law includes all who are directly interested in the subject-matter, and had a right to make defence, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are regarded as *strangers* to the cause.[1] But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen, that the term *privity* denotes mutual or successive relationship to the same rights of property.[2] The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings, to which he was a party, is, that

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[1] Duchess of Kingston's case, 20 Howell's St. Tr. 538, n. Where a father, during the absence of his minor son from the country, commenced an action of crim. con. as his *prochein amy*, the judgment was held conclusive against the son, after his majority; the *prochein amy* having been appointed by the Court. Morgan *v.* Thorne, 9 Dowl. 228.

[2] Ante, § 189. See also § 19, 20.

they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded. Hence all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity.[1] And if one covenants for the results or consequences of a suit between others, as, if he covenants that a certain mortgage, assigned by him, shall produce a specified sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him.[2]

§ 524. But to prevent this rule from working injustice, it is held essential that its operation be *mutual*. Both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either. For if the adverse party was not also a party to the judgment offered in evidence, it may have been obtained upon his own testimony; in which case, to allow him to derive a benefit from it would be unjust.[3] Another qualification of the rule is, that a party is not to be concluded by a judgment in a prior suit or prosecution, where, from the nature or course of the proceedings, he could not avail himself of the same means of defence, or of redress, which are open to him in the second suit.[4]

§ 525. An apparent *exception* to this rule, as to the identity of the parties, is allowed in the cases usually termed proceedings *in rem;* which include not only judgments of condemnation of property as forfeited, or as prize, in the Exchequer or Admiralty, but also the decisions of other Courts directly upon the personal *status*, or relations of the party, such as marriage, divorce, bastardy, settlement, and the like. These decisions are binding and conclusive, not only upon the parties actually

[1] Carver *v.* Jackson, 4 Peters, 85, 86; Case *v.* Reeve, 14 Johns. 81. See also Kinnersley *v.* Wm. Orpe, 2 Doug. 517, expounded in 14 Johns. 81, 82, by Spencer, J.

[2] Rapelye *v.* Prince, 4 Hill, R. 119.

[3] Wood *v.* Davis, 7 Cranch, 271; Davis *v.* Wood, 1 Wheat. 6.

[4] 1 Stark. Evid. 214, 215.

litigating in the cause, but upon all others; partly upon the ground, that in most cases of this kind, and especially in questions upon property seized and proceeded against, every one who can possibly be affected by the decision, has a right to appear and assert his own rights, by becoming an actual party to the proceedings; and partly upon the more general ground of public policy and convenience, it being essential to the peace of society, that questions of this kind should not be left doubtful, but that the domestic and social relations of every member of the community should be clearly defined and conclusively settled and at rest.[1]

§ 526. A further exception is admitted in the case of verdicts and judgments upon subjects of a *public nature*, such as customs, and the like; in most or all of which cases, evidence of reputation is admissible; and also in cases of judgments *in rem*, which may be again mentioned hereafter.[2]

§ 527. A judgment, when used by way of *inducement*, or to establish a *collateral* fact, may be admitted, though the parties are not the same. Thus, the record of a conviction may be shown, in order to prove the legal infamy of a witness. So, it may be shown, in order to let in the proof of what was sworn at the trial; or, to justify proceedings in execution of the judgment. So, it may be used to show that the suit was determined; or, in proper cases, to prove the amount which a principal has been compelled to pay for the default of his agent; or, the amount which a surety has been compelled to pay for the principal debtor; and in general, to show the fact, that the judgment was actually rendered at such a time and for such an amount.[3]

§ 527 *a*. A record may also be admitted in evidence in

[1] 1 Stark. Evid. 27, 28.

[2] See Post, § 541, 542, 544, 555.

[3] 2 Phil. Evid. p. 3; Green *v.* New River Co. 4 T. R. 589, per Ld. Kenyon. See further, Post, § 538, 539.

favor of a stranger, against one of the parties, as containing a *solemn admission*, or judicial declaration by such party, in regard to a certain fact. But in that case, it is admitted not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs. Thus, where a carrier brought trover against a person, to whom he had delivered the goods intrusted to him, and which were lost, the record in this suit was held admissible for the owner, in a subsequent action brought by him against the carrier, as amounting to a confession in a Court of record, that he had the plaintiff's goods.[1] So also, where the plaintiff in an action of trespass *quare clausum fregit*, claimed title by disseisin, against a grantee of the heirs of the disseisee, it was held, that the count in a writ of right, sued by those heirs against him, might be given in evidence, as their declaration and admission that their ancestor died disseised, and that the present plaintiff was in possession.[2] So, where two had been sued as partners, and had suffered judgment by default, the record was held competent evidence of an admission of the partnership, in a subsequent action brought by a third person against them as partners.[3] And on the same ground, in a libel by a wife for a divorce, because of the extreme cruelty of the husband, the record of his conviction of an assault and battery upon her, founded upon his plea of guilty, was held good evidence against him, as a judicial admission of the fact. But if the plea had been not guilty, it would have been otherwise.[4]

§ 528. The principle upon which judgments are held con-

[1] Tiley *v.* Cowling, 1 Ld. Raym. 744, per Holt, C. J.; Bull. N. P. 243, S. C.

[2] Robinson *v.* Swett, 3 Greenl. 316; Ante, § 195; Wells *v.* Compton, 3 Rob. Louis. R. 171.

[3] Cragin *v.* Carleton, 8 Shepl. 492.

[4] Bradley *v.* Bradley, 2 Fairf. 367; Woodruff *v.* Woodruff, Ib. 475.

clusive upon the parties, requires that the rule should apply only to that which was *directly in issue*, and not to every thing which was incidentally brought into controversy during the trial. We have seen, that the evidence must correspond with the allegations, and be confined to the point in issue. It is only to the material allegations of one party that the other can be called to answer; it is only upon such that an issue can properly be formed; to such alone can testimony be regularly adduced; and upon such an issue only is judgment to be rendered. A record, therefore, is not held conclusive as to the truth of any allegations, which were not material nor traversable; but as to things material and traversable, it is conclusive and final. The general rule on this subject was laid down, with admirable clearness, by Lord Chief Justice De Grey, in the Duchess of Kingston's case,[1] and has been repeatedly confirmed and followed, without qualification. "From the variety of cases," said he, "relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar; or, as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose.[2] But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter, which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment."[3]

[1] 20 Howell's St. Tr. 538; expressly adopted and confirmed in Harvey *v.* Richards, 2 Gall. 229, per Story, J.; and in Hibsham *v.* Dulleban, 4 Watts, 183, per Gibson, C. J.

[2] Thus, a judgment at Law, against the validity of a bill, as having been given for a gambling debt, is conclusive of that fact in Equity also. Pearce *v.* Gray, 2 Y. & C. 322.

[3] The American cases, to the same point, are collected in Cowen & Hill's

§ 529. It is only where the point in issue has been *determined*, that the judgment is a bar. If the suit is discontinued, or the plaintiff becomes nonsuit, or for any other cause there has been no judgment of the Court upon the matter in issue, the proceedings are not conclusive.[1]

§ 530. So also, in order to constitute the former judgment a complete bar, it must appear to have been a *decision upon the merits;* and this will be sufficient, though the declaration were essentially defective, so that it would have been adjudged bad on demurrer.[2] But if the trial went off on a technical defect,[3] or because the debt was not yet due,[4] or because the Court had not jurisdiction,[5] or because of a temporary disability of the plaintiff to sue,[6] or the like, the judgment will be no bar to a future action.

§ 531. It is well settled, that a former recovery may be shown in evidence, under the general issue, as well as pleaded in bar; and that when pleaded, it is conclusive upon the parties.[7] But whether it is *conclusive when given in evidence,*

note 557, to 1 Phil. Evid. 321. This subject, particularly with regard to the identity of the issue or subject-matter in controversy, in actions concerning the realty, is ably reviewed and illustrated by Putnam, J. in Arnold *v.* Arnold, 17 Pick. 7–14.

[1] Knox *v.* Waldoborough, 5 Greenl. 185; Hull *v.* Blake, 13 Mass. 155; Sweigart *v.* Berk, 8 S. & R. 305; Bridge *v.* Sumner, 1 Pick. 371; 3 Bl. Comm. 296, 377. So, if the judgment has been reversed. Wood *v.* Jackson, 8 Wend. 9. If there has been no judgment, it has been ruled that the pleadings are not admissible, as evidence of the facts recited in them. Holt *v.* Miers, 9 C. & P. 191.

[2] Hughes *v.* Blake, 1 Mason, 515, 519, per Story, J.

[3] Ibid.; Lane *v.* Harrison, Munf. 573; McDonald *v.* Rainor, 8 Johns. 442; Lepping *v.* Kedgewin, 1 Mod. 207.

[4] N. Eng. Bank *v.* Lewis, 8 Pick. 113.

[5] Estill *v.* Taul, 2 Yerg. 467, 470.

[6] Dixon *v.* Sinclear, 4 Verm. 354.

[7] Trevivan *v.* Lawrence, 1 Salk. 276; 3 Salk. 151, S. C.; Outram *v.* Morewood, 3 East, 346; Kitchen *v.* Campbell, 3 Wils. 304; 2 W. Bl. 827, S. C.

is a point which has been much doubted. It is agreed, that when there has been no opportunity to plead a matter of estoppel in bar, and it is offered in evidence, it is equally conclusive, as if it had been pleaded.[1] And it is further laid down, that when the matter, to which the estoppel applies, is alleged by one party, and the other, instead of pleading the estoppel, chooses to take issue on the fact, he waives the benefit of the estoppel, and leaves the Jury at liberty to find according to the fact.[2] This proposition is admitted, in its application to estoppels arising from an act of the party himself, in making a deed, or the like; but it has been denied in its application to judgments recovered; for, it is said, the estoppel, in the former case, is allowed for the benefit of the other party, which he may waive; but the whole community have an interest in holding the parties conclusively bound by the result of their own litigation. And it has been well remarked, that it appears inconsistent, that the authority of a *res judicata* should govern the *Court*, when the matter is referred to them by pleading, but that a *Jury* should be at liberty altogether to disregard it, when the matter is referred to them in evidence; and, that the operation of so important a principle should be left to depend upon the technical forms of pleading in particular actions.[3] And notwithstanding there are many respectable opposing decisions, the weight of authority, at least in the United States, is believed to be in favor of the position, that where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by way of estoppel.[4]

[1] Howard *v.* Mitchell, 14 Mass. 241; Adams *v.* Barnes, 17 Mass. 365.

[2] Ibid.

[3] Phil. & Am. on Evid. 512.

[4] This point was briefly, but very forcibly, argued by Kennedy, J. in Marsh *v.* Pier, 4 Rawle, 288, 289, in the following terms. "The propriety of those decisions, which have admitted a judgment in a former suit to be given in evidence to the Jury, on the trial of a second suit for the same cause, between the same parties, or those claiming under them, but at the same time have held that the Jury were not absolutely bound by such judgment, because it was

§ 532. When a former judgment is shown by way of bar, whether by pleading, or in evidence, it is competent for the plaintiff to reply, that it did *not relate to the same property*

not pleaded, may well be questioned. The maxim, nemo debet bis vexari, si constet curiæ quod sit pro una et eadem causa, being considered, as doubtless it was, established for the protection and benefit of the party, he may therefore waive it; and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then it ought to be recollected, that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence, it would seem to follow, that, wherever on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action for the same cause, between the same parties, or those claiming under them, is properly given in evidence to the Jury, that it ought to be considered conclusively binding on both Court and Jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, expedit reipublicæ ut sit finis litium, which is as old as the law itself, and a part of it, will be exploded and entirely disregarded. But if it be part of our law, as seems to be admitted by all that it is, it appears to me, that the Court and Jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of a litigious disposition, on the part of suitors, to the preservation of the public tranquillity and happiness. The result, among other things, would be, that the tribunals of the State would be bound to give their time and attention to the trial of new actions, for the same causes, tried once or oftener, in former actions between the same parties or privies without any limitation, other than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally of other causes, which never have passed in rem judicatam. The effect of a judgment of a Court, having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself, in making a deed of indenture, &c., which may, or may not, be enforced at the election of the other party; because, whatever the parties have done by compact, they may undo by the same means. But a judgment of a proper Court, being the sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the Courts and Juries, ever afterwards, as long as it shall remain in force and unreversed." A similar view, with the like distinction,

or transaction in controversy in the action, to which it is set up in bar; and the question of identity, thus raised, is to be determined by the Jury, upon the evidence adduced.[1] And though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet if, upon the whole record, it remains doubtful whether the same subject-matter were actually passed upon, it seems that parol evidence may be received to show the truth. So also, if the pleadings present several distinct propositions, and the verdict may be referred to either or to all with the same propriety, the judgment is not conclusive, but only *primâ facie* evidence upon any one of the propositions, and evidence

was taken by Huston, J. in Kilheffer *v.* Herr, 17 S. & R. 325, 326. See also, to the point, that the evidence is conclusive, Shafer *v.* Stonebraker, 4 G. & J. 345; Cist *v.* Zigler, 16 S. & R. 282; Betts *v.* Starr, 5 Conn. 550, 553; Preston *v.* Harvey, 2 H. & Mun. 55; Estill *v.* Taul, 2 Yerg. 467, 471. In New York, as remarked by Savage, C. J. in Wood *v.* Jackson, 8 Wend. 24, 25, the decisions have not been uniform, nor is it perfectly clear, where the weight of authority or of argument lies. But in the later case of Lawrence *v.* Hunt, 10 Wend. 83, 84, the learned Judge, who delivered the opinion of the Court, seems inclined in favor of the conclusiveness of the evidence. See, to the same point, Hancock *v.* Welch, 1 Stark. R. 347; Whately *v.* Menheim, 2 Esp. 608; Strutt *v.* Bovingdon, 5 Esp. 56, 59; Rex *v.* St. Pancras, Peake's Cas. 220; Duchess of Kingston's case, 20 Howell's St. Tr. 538; Bird *v.* Randall, 3 Burr. 1353. The contrary decision of Vooght *v.* Winch, 2 B. & Ald. 662, was cited, but without being approved by Best, C. J. in Stafford *v.* Clark, 1 C. & P. 405, and was again discussed in the same case, 2 Bing. 377; but each of the learned Judges expressly declined giving any opinion on the point. This case, however, is reconciled with other English cases, by Mr. Smith, on the ground, that it means no more than this, that where the party might plead the record by estoppel, but does not, he waives its conclusive character. See 2 Smith's Leading Cases, 434, 444, 445. The learned author in the note here referred to, has reviewed the doctrine of estoppels in a masterly manner. The judgment of a Court Martial, when offered in evidence in support of a justification of imprisonment, by reason of military disobedience and misconduct, is not regarded as conclusive; for the special reasons stated by Lord Mansfield in Wall *v.* McNamara, 1 T. R. 536. See acc. Hannaford *v.* Hunn, 2 C. & P. 148.

[1] So, if a deed is admitted in pleading, proof of the identity may still be required. Johnston *v.* Cottingham, 1 Armstr. Macartn. & Ogle, R. 11.

aliundè is admissible to rebut it.[1] Thus, where the plaintiff in a former action declared upon a promissory note, and for goods sold, but upon executing the writ of inquiry, after judgment by default, he was not prepared with evidence on the count for goods sold, and therefore took his damages only for the amount of the note; he was admitted, in a second action for the goods sold, to prove the fact by parol, and it was held no bar to the second action.[2] And upon the same principle, if one wrongfully take another's horse and sell him, applying the money to his own use, a recovery in trespass, in an action by the owner for the taking, would be a bar to a subsequent action of *assumpsit* for the money received, or for the price, the cause of action being proved to be the same.[3]

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[1] Henderson *v.* Kenner, 1 Richardson, R. 474.

[2] Seddon *v.* Tutop, 6 T. R. 608; Hadley *v.* Green, 2 Tyrwh. 390. See acc. Bridge *v.* Gray, 14 Pick. 55; Webster *v.* Lee, 5 Mass. 334; Ravee *v.* Farmer, 4 T. R. 146; Thorpe *v.* Cooper, 5 Bing. 116; Phillips *v.* Berrick, 16 Johns. 136. But if the Jury have passed upon the claim, it is a bar, though they may have disallowed it for want of sufficient evidence. Stafford *v.* Clark, 2 Bing. 377, 382, per Best, C. J.; Phillips *v.* Berrick, supra. So, if the fact constituting the basis of the claim was proved, among other things, before an arbitrator, but he awarded no damages for it, none having been at that time expressly claimed. Dunn *v.* Murray, 9 B. & C. 780. So, if he sues for part only of an entire and indivisible claim; as, if one labors for another a year, on the same hiring, and sues for a month's wages, it is a bar to the whole. Miller *v.* Covert, 1 Wend. 487. But it seems that, generally, a running account for goods sold and delivered does not constitute an entire demand. Badger *v.* Titcomb, 15 Pick. 415. Contra, Guernsey *v.* Carver, 8 Wend. 492. So, if, having a claim for a greater amount, consisting of several distinct particulars, he sues in an inferior Court, and takes judgment for a less amount. Bagot *v.* Williams, 3 B. & C. 235. So, if he obtains an interlocutory judgment for his whole claim, but, to avoid delay, takes a rule to compute on one item only, and enters a *nolle prosequi* as to the other. Bowden *v.* Horne, 7 Bing. 716.

[3] 17 Pick. 13, per Putnam, J.; Young *v.* Black, 7 Cranch, 565; Livermore *v.* Herschell, 3 Pick. 33. Whether parol evidence would be admissible, in such case, to prove that the damages awarded in trespass were given merely for the tortious taking, without including the value of the goods, to which no evidence had been offered; *quære*, and see Loomis *v.* Green, 7 Greenl. 386.

But where, from the nature of the two actions, the cause of action cannot be the same in both, no averment will be received to the contrary. Therefore, in a writ of right, a plea in bar that the same title had been the sole subject of litigation in a former action of trespass *quare clausum fregit*, or in a former writ of entry, between the same parties, or others privy in estate, was held to be a bad plea.[1] Whether the judgment in an action of trespass, upon the issue of *liberum tenementum*, is admissible in a subsequent action of ejectment between the same parties, is not perfectly clear; but the weight of American authority is in favor of admitting the evidence.[2]

§ 533. The effect of a *former recovery* has been very much discussed, in the cases where *different actions in tort* have *successively been brought*, in regard to the same chattel; as, for example, an action of trover, brought after a judgment in trespass. Here, if title to the property was set up by the defendant in the first action, and it was found for him, it is clearly a bar to a second action for the same chattel;[3] even though brought against one not a party to the former suit, but an accomplice in the original taking.[4] So, a judgment for the defendant in trover, upon trial of the merits, is a bar to an action for money had and received, for the money arising from the sale of the same goods.[5] But, whether the plaintiff, having recovered judgment in trespass, without satisfaction, is thereby barred from afterwards maintaining trover against another person, for the same goods, is a point upon which

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[1] Arnold *v.* Arnold, 17 Pick. 4; Bates *v.* Thompson, Ib. 14, n.; Bennett *v.* Holmes, 1 Dev. & Bat. 486.

[2] Hoey *v.* Furman, 1 Barr, Pennsylv. R. 295. And see Meredith *v.* Gilpin, 6 Price, 146; Kerr *v.* Chess, 7 Watts, 371; Foster *v.* McDivit, 9 Watts, 349.

[3] Putt *v.* Roster, 2 Mod. 218; 3 Mod. 1, S. C. nom. Putt *v.* Rawstern. See 2 Show. 211; Skin. 49, 57; T. Raym. 472, S. C.

[4] Ferrers *v.* Arden, Cro. El. 668; 6 Co. 7, S. C.

[5] Kitchen *v.* Campbell, 3 Wils. 304; 2 W. Bl. 827, S. C.